UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ROBERT LUNDY, Plaintiff, vs. ALEX and JANET COLMENERO, et. al., Defendant.	CASE NO. 08-CV-1153 JM (CAB) **ORDER (1) GRANTING MOTION TO PROCEED IN FORMA PAUPERIS; (2) DENYING MOTION FOR THE APPOINTMENT OF COUNCIL; (3) DENYING MOTION FOR TEMPORARY RESTRAINING ORDER; AND (4) DISMISSING COMPLAINT WITH LEAVE TO AMEND FOR FAILURE TO STATE A CLAIM**

On June 27, 2008, Robert Lundy ("Plaintiff"), a non-prisoner proceeding *pro se*, filed this civil rights action against Defendants Alex and Janet Colmenero and the Superior Court of San Diego. Plaintiff has also submitted a motion to proceed in forma pauperis, a motion for the appointment of counsel, and a motion for a temporary restraining order. For the reasons set forth below, the court **GRANTS** the motion to proceed in forma pauperis, **DENIES** the motion for the appointment of counsel, **DENIES** the motion for a temporary restraining order and **DISMISSES** the civil rights complaint with leave to amend.

I. Background

The history of Plaintiff's case and his exact objectives in this action are unclear, but from what can be discerned, the relevant allegations are as follows: Plaintiff seems to allege a claim under 42

U.S.C. § 1983 against all defendants. See Compl. at pg.1. Plaintiff never explicitly mentions section 1983, but he appears to claim that Defendant Superior Court violated his equal protection and due process rights by racially discriminating against him, allowing violations of court orders, and depriving him of his parental right to have custody of his daughter. See Compl. at pg. 1-2. Plaintiff claims that Defendants Alex and Janet Colmenero, ostensibly the foster parents of Plaintiff's daughter, are violating his due process rights by refusing to return Plaintiff's daughter to him in violation of court orders to do so. See Compl. at pg. 1. Plaintiff also apparently brings a 42 U.S.C. § 1985(3) claim against Defendants Alex and Janet Colmenero for violating Plaintiff's due process rights by conspiring to retain physical custody of Plaintiff's daughter in violation of court orders. See Compl. at pg.1-2. The body of the complaint does not contain an explicit mention of section 1985(3), but Plaintiff did list it as the cause of action on the civil cover sheet. Plaintiff seeks monetary damages in the amount of $5,000,000 and an injunction giving him custody of his daughter. See Compl. at pg. 1-2.

II. Discussion

1. Motion to Proceed in Forma Pauperis

A. Legal Standard

There is no constitutional right to proceed in forma pauperis. Rodriguez v. Cook, 169 F.3d 1176, 1180 (9th Cir. 1999). However, the court may authorize the commencement of an action without prepayment of fees or securities by a person who submits an affidavit showing that he or she cannot afford to pay such fees or give such securities. 28 U.S.C. 1915(a)(1); Franklin v. Murphy, 745 F.2d 1221, 1226 (9th Cir. 1984).

B. Analysis

Plaintiff's motion to proceed in forma pauperis states that he earns $938 bi-monthly and has no sources of income other than his job with San Diego Scenic Tours. Plaintiff also has substantial debt. He owes $12,000 to Capital One, $12,000 to Merrick Bank, and $975 to Houston Apartments. Plaintiff also owes $15,000 in child support. In addition, Plaintiff claims that his daughter is dependent on him for support. Having considered these facts, the court **GRANTS** Plaintiff's motion to proceed in forma pauperis.

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2. Failure to State a Claim

A. Legal Standard

Courts must, sua sponte, dismiss a plaintiff's action if the complaint is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). In determining whether or not a plaintiff has stated a claim, "the issue is not whether the plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) (overruled on other grounds by Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). As such, the court must accept the complaint's allegations as true. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). It is imperative to liberally construe civil rights complaints brought by *pro se* plaintiffs. See Bretz v. Kelman, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985).

B. Analysis

42 U.S.C. § 1983

To state a claim under section 1983, plaintiff must allege that (1) the action occurred under color of state law and (2) the action deprived Plaintiff of a constitutional right or a federal statutory right. See Parratt v. Taylor, 451 U.S. 527, 535 (1981) (overruled on other grounds by Daniels v. Williams, 474 U.S. 327, 330 (1986)).

Courts have interpreted the portion of section 1983 that requires the action to be "under color of state law" to require the defendant to be a person "who may fairly be said to be a state actor, either because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state." Lugar v. Edmondson, 457 U.S. 922, 923 (1982). Plaintiff has made no such allegation with respect to the Colmeneros, and, assuming the Colmeneros are the foster parents of Plaintiff's daughter, would likely not be able to make such an allegation.[1] Thus, Plaintiff cannot state a section 1983 claim against them. See Lugar,

[1]Although the Ninth Circuit has not definitively resolved the issue, all circuits that have agree that foster parents are not state actors for the purposes of section 1983. See Leshko v. Servis, 423 F.3d 337, 347 (3rd Cir. 2005); Rayburn ex rel. Rayburn v. Hogue, 241 F.3d 1341,1348 (11th Cir. 2001); K.H. through Murphy v. Morgan, 914 F.2d 846, 852 (7th Cir. 1990); Milburn by Milburn v. Anne Arundel County Dept. Of Social Services, 871 F.2d 474, 479 (4th Cir. 1989).

457 U.S. at 923.

With respect to the Superior Court, the Eleventh Amendment renders state entities immune from tort actions for damages. U.S. Const. Amend. XI. In Will v. Michigan Dept. of State Police, 491 U.S. 58, 70 (1989), the court held that state entities for the purposes of eleventh amendment immunity are not "persons" within the meaning of 42 U.S.C. § 1983. The superior courts of California are state entities. See Greater Los Angeles Council on Deafness, Inc. V. Zolin, 812 F.2d 1103, 1110 (9th Cir.1987) (citing Sacramento and San Joaquin Drainage Dist. V. Superior Court in and for Colusa County, 196 Cal. 414, 432 (1925)). Thus, the Superior Court of San Diego is not a "person" within the meaning of section 1983, and Plaintiff cannot bring a section 1983 claim for monetary damages against it. See Will, 491 U.S. at 70.[2]

Furthermore, when the defendant is the State itself as opposed to a state official, the Eleventh Amendment bars suits for injunctive relief as well. See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 58 (1996); Cory v. White, 457 U.S. 85, 90-91 (1982). Therefore, because the Superior Court is a state entity and not a state official, Plaintiff cannot state a section 1983 claim against the Superior Court for injunctive relief. See Seminole Tribe of Florida, 517 U.S. at 58; Cory, 457 U.S. at 90-91.[3]

42. U.S.C. § 1985(3)

Section 1985(3) makes it unlawful to conspire to interfere with any person's civil rights. 42 U.S.C. § 1985(3). To state a claim for a violation of section 1985(3), a plaintiff must allege four elements: (1) conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of this conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States. Server v.

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[2]To the extent Plaintiff is seeking damages for court rulings, Plaintiff is precluded from such redress. Judges are absolutely immune from suits for damages if the challenged action was a judicial act taken when the judge had jurisdiction over the subject matter. See Stump v. Sparkman, 435 U.S. 349, 356 (1978). 42 U.S.C. 1983, which imposes liability on "every person" who, acting under color of state law, deprives another person of his civil rights, did not abolish the principle of absolute judicial immunity. See Pierson v. Ray, 386 U.S. 547, 554 (1967).

[3]Because the section 1983 and section 1985(3) claims can be dismissed on other grounds, the court need not determine whether Plaintiff's complaint has sufficiently demonstrated the deprivation of some constitutional or federal civil right.

Alaska Pulp Corp., 978 F.2d 1529, 1536 (9th Cir. 1992). The United States Supreme Court has interpreted section 1985(3) to require some racial or otherwise class-based invidiously discriminatory animus behind the conspirators' actions. See Griffin v. Breckenridge, 403 U.S. 88, 91 (1971).

In his complaint, Plaintiff alleges racial discrimination by the Superior Court and a mediator in their rulings, but nowhere does he allege that racial discrimination was a motivating factor behind the Colmeneros' "conspiracy" to keep Plaintiff's daughter from him. Plaintiff therefore fails to state a section 1985(3) claim against the Colmeneros. See Griffin, 403 U.S. at 91.

3. Jurisdictional Issues

Subject Matter Jurisdiction

Even if Plaintiff amends his complaint in such a way as to state a claim upon which relief may be granted, this court might, depending on the facts of the case, lack subject matter jurisdiction due to the Rooker-Feldman doctrine.

The Rooker-Feldman doctrine provides that federal district courts lack jurisdiction to review "cases brought by state court losers complaining of injuries caused by state court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 U.S. 280, 284 (2005). The alleged facts of Plaintiff's complaint seem to indicate that Plaintiff won his child custody battle in state court. If this is true, Rooker-Feldman would not apply because Plaintiff would not be considered a "state court loser." See Exxon Mobil Corp., 544 U.S. 280 at 284. If, however, Plaintiff lost his custody battle in state court and is seeking review of that decision in this court, the Rooker-Feldman doctrine would apply and this court would lack jurisdiction over the matter. See id.[4]

Abstention

If the Rooker-Feldman doctrine does not apply, abstention might still be appropriate in this case.

Abstention is the practice of federal courts exercising a wise discretion and restraining their

[4]Even if the Rooker-Feldman doctrine does not apply, this court might, depending on the facts of the case, lack jurisdiction because of the domestic relations exception, which divests the federal court of power to issue divorce, alimony, and child custody decrees. See Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992); In re Burrus, 136 U.S. 586, 594 (1890).

authority because of regard for the independence of state governments. See Burford v. Sun Oil Co., 319 U.S. 315, 332 (1943). Abstention should rarely be invoked because federal courts have a "virtually unflagging obligation...to exercise the jurisdiction given them." See Ankenbrandt, 504 U.S. at 705 (quoting Colorado River Water Conservation Dist., 424 U.S. 800, 814 (1976)).

Among the several types of abstention, "Younger" abstention is the type most likely applicable to this case. "Younger" abstention derived from Younger v. Harris, 401 U.S. 37 (1971) and provides that courts should abstain from hearing a case when hearing the case would interfere with pending state proceedings. See M & A Gabaee v. Community Redevelopment Agency of City of Los Angeles, 419 F.3d 1036, 1039 (9th Cir. 2005); Ankenbrandt, 504 U.S. at 705. Thus, if Plaintiff's child custody case is still pending in state court, this court must abstain. See M & A Gabaee, 419 F.3d at 1039; Ankenbrandt, 504 U.S. at 705.

4. Motion for the Appointment of Counsel

A. Legal Standard

There is no constitutional right to appointed counsel in a civil action. Lassiter v. Dept. of Social Servs., 452 U.S. 18, 25 (1981). Courts, however, "...may request an attorney to represent any person unable to afford counsel." 28 U.S.C. § 1915(e)(1). Courts may appoint counsel under section 1915(e)(1) only under "exceptional circumstances." Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991). Whether or not "exceptional" circumstances exist depend upon both "the likelihood of success on the merits as well as the ability of the petitioner to articulate his claims *pro se* in light of the complexity of the legal issues involved." Id. (quoting Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th Cir. 1986)). Neither of these factors is dispositive; courts must consider them together before reaching a decision. See id.

B. Analysis

Plaintiff has not demonstrated that his civil rights claims involve a "complexity" that warrants the appointment of counsel, nor has he shown a likelihood of success on the merits. Accordingly, Plaintiff's case does not involve "exceptional circumstances," and the court therefore **DENIES** Plaintiff's motion for the appointment of counsel.

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5. Motion for Temporary Restraining Order

A. Legal Standard

In order to obtain a temporary restraining order, the moving party must demonstrate either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) the existence of serious questions going to the merits and the balance of hardships tips sharply in its favor. See Arcamuzi v. Continental Airlines, Inc., 819 F.2d 935, 937 (9th Cir. 1987). These two formulations represent a sliding scale where the required probability of success on the merits increases as the possibility of irreparable injury decreases, and vice versa. See Big Country Foods, Inc., v. Board of Educ. of the Anchorage School Dist., 868 F.2d 1085, 1088 (9th Cir. 1989). In both formulations, however, the moving party must show a significant threat of irreparable injury and a "fair chance of success on the merits." Arcamuzi, 819 F.2d at 937.

B. Analysis

For the reasons discussed above, Plaintiff has not shown a "fair chance of success on the merits." As such, the possibility of irreparable harm is irrelevant. The court therefore **DENIES** the motion for a temporary restraining order.

III. Conclusion

For the foregoing reasons, the court hereby **GRANTS** Plaintiff's motion to proceed in forma pauperis, **DENIES** Plaintiff's motion for the appointment of counsel, **DENIES** Plaintiff's motion for a temporary restraining order and **DISMISSES** Plaintiff's section 1983 and section 1985(3) causes of action for failure to state a claim upon which relief may be granted with 30 days leave to amend from the date of this order.

IT IS SO ORDERED.

DATED: August 13, 2008

Hon. Jeffrey T. Miller
United States District Judge

cc: all parties